RECENT CASES

BANKRUPTCY CLAIMS—NLRB BACK PAY ORDER IS ENTITLED TO PRIORITY AS A DEBT OWING TO THE UNITED STATES—The NLRB found that an employer had discriminatorily discharged workmen for union membership, and ordered the employer to provide back pay for the period between their discharge and the employer's offer of reinstatement.[1] Four months after the NLRB order, and more than ten months after the period for which back pay was allowed, an involuntary petition in bankruptcy was filed against the employer. Subsequently the NLRB obtained enforcement of its order from a circuit court,[2] and filed a proof of claim for the back pay allowance in the bankruptcy proceeding. The referee disallowed the claim on the grounds, *inter alia,* that the Board had not been correct in determining that the employer was liable for an unfair labor practice, and that in any case the claim was unliquidated.[3] On petition the district court set aside the referee's order, allowing the claim and giving it a priority over general creditors.[4] On appeal the district court was affirmed, the circuit court holding (1) that the NLRB back pay allowance was a provable debt in bankruptcy under § 63a(1) of the Bankruptcy Act as a fixed liability evidenced by a judgment,[5] and (2) that the back pay allowance was entitled to priority as a debt owing to the United States under § 64a(5).[6] *Nathanson v. NLRB,* 194 F.2d 248 (1st Cir. 1952).

The instant decision presents a second route through the Bankruptcy Act to enforce the back pay policy of the National Labor Relations Act. In *NLRB v. Killoran,*[7] the only previous decision involving the question

1. In the Matter of Hill Transportation Co. and MacKenzie Coach Lines, Inc., 75 N.L.R.B. 1203 (1948).

2. NLRB v. Hill Transportation Co. and MacKenzie Coach Lines, Inc., No. 4395, 1st Cir., Dec. 7, 1948.

3. The Board computed the amount of back pay *after* the petition in bankruptcy had been filed. It is settled, however, that the *amount* of liability need not be ascertained as a prerequisite to provability of indebtedness in a bankruptcy proceeding. Brown v. O'Keefe, 300 U. S. 598 (1937); Haynes Stellite Co. v. Chesterfield, 97 F.2d 985 (6th Cir. 1938). The district court in the instant case allowed the Board two months in which to fix the amount of back pay due. See *In re* Schroeter, 52 F. Supp. 667 (E.D.N.Y. 1943).

4. *In re* MacKenzie Coach Lines, Inc., 100 F. Supp. 489 (D. Mass. 1951).

5. 52 STAT. 873 (1938), 11 U.S.C. § 103a(1) (1946): "Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not . . ."

6. 52 STAT. 874 (1938), 11 U.S.C. § 104a(5) (1946): "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of the bankrupt estates, and the order of payment, shall be . . . (5) debts owing to any person, including the United States, who by the laws of the United States in [*sic*] entitled to priority . . ."

7. 122 F.2d 609 (8th Cir.), *cert. denied,* 314 U.S. 696 (1941). The case was widely commented on. *E.g.,* 90 U. OF PA. L. REV. 100 (1941); 40 COL. L. REV. 1272 (1940); 55 HARV. L. REV. 539 (1942).

of back pay allowance in a bankruptcy proceeding, the Court of Appeals for the Eighth Circuit held (1) that the NLRB order was a provable debt under § 63a(4) of the Bankruptcy Act as an implied contract, in this case an obligation imposed by statute, and (2) that it was entitled to priority as wages earned under § 64a(2).[8] There is no provision in the Bankruptcy Act specifically including NLRB back pay orders within the limited categories of provability under § 63 or priority under § 64. To be included, therefore, they must be handled largely by analogy.[9] The courts are apparently willing, at least with respect to NLRB orders, to approach bankruptcy claims in this light, although sometimes in the past they have hewed more closely to the language of the Bankruptcy Act,[10] thus necessitating legislative amendment to bring new types of claims within the Act.[11]

The First Circuit Court in the instant case analogized an administrative order to a court judgment for the purpose of proving the existence of a debt against the bankrupt under § 63a(1). Judgments against the debtor are res judicata in subsequent bankruptcy proceedings,[12] and like effect was given the NLRB order against the employer. Where Congress has delegated exclusive authority to the NLRB to determine liability on particular facts, no violence is done to the purpose of the Bankruptcy Act in allowing the Board's orders to be conclusive on the bankruptcy court.[13] Whether the liability is judicial or quasi-judicial, however, it cannot be allowed as a provable debt if it constitutes a penalty or fine against the bankrupt.[14] The purpose of NLRB back pay orders has been expressly stated as remedial toward the employees rather than punitive against the employer,[15] and damages are computed accordingly; hence, allowance of the orders in bankruptcy would not have the sole effect of penalizing

8. 52 STAT. 874 (1938), 11 U.S.C. § 104a(2) (1946): "The debts to have priority . . . shall be . . . (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceedings . . ."

9. *Cf.* Brown v. O'Keefe, 300 U.S. 598 (1937) (bank stockholders' statutory liability to creditors held to be an implied contract provable in bankruptcy).

10. *E.g.*, Lane v. Industrial Com'r, 54 F.2d 338 (2nd Cir. 1931) (workmen's compensation award, although determined by a quasi-judicial administrative agency and although it was an obligation imposed by statute on the employer, was neither a judgment nor an implied contract within the meaning of § 63 of the Bankruptcy Act, and hence not a debt provable in bankruptcy).

11. The decision in the Lane case, *supra* note 10, soon brought forth an amendment to § 63 explicitly making workmen's compensation awards provable in bankruptcy. 48 STAT. 911 (1934), 11 U.S.C. § 103a(6) (1946). *Cf. In re* Dearborn Mfg. Corp., 92 F.2d 417 (2d Cir. 1937).

12. Heiser v. Woodruff, 327 U. S. 726 (1946).

13. *Cf.* Smith v. Hoboken R. Co., 328 U.S. 123 (1946) (bankruptcy court must stay its hand in reorganization until ICC considers proposed forfeiture of railroad lease).

14. § 57j of the Bankruptcy Act, 11 U.S.C. § 93j (1946), prohibits allowance of penalties. See United States v. Paddock, 187 F.2d 271 (5th Cir. 1951); *see In re* Shawsheen Dairy, 47 F. Supp. 494, 497 (D. Mass. 1942).

15. *See* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257 (1939); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938). *Cf.* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (discharged employees' actual earnings during period of discharge are deductible from back pay allowances against employer).

other bona fide creditors for the wrongs of the bankrupt. Liability imposed by an NLRB order is not affected by subsequent events such as the death of the employer,[16] the death of the employee,[17] or the elimination of the place of business.[18] Subsequent bankruptcy of the employer presents no stronger reason to alter his liability for back pay. For the purpose of fixing liability within the meaning of § 63a(1), therefore, an administrative adjudication such as an NLRB back pay order [19] may well be given the same effect as a court judgment. Nevertheless, it is difficult to say that the First Circuit Court's treatment of the Board's claim as a judgment is preferable to the Eighth Circuit's treatment of the claim as an implied contract,[20] since both courts reached the same result of allowing the Board's order to be proven in the bankruptcy proceeding.

More crucial is the difference between the courts on the relative priority to be given an order of the Board in a bankruptcy proceeding. In the instant case the First Circuit held that the back pay allowance was entitled to a fifth priority as a debt owing to the United States. It is true that back pay allowances are not private rights enforceable [21] or assignable [22] by the employees. The employees receive the back pay only through the Board and need not be present or parties to the proceedings against the employer.[23] Heretofore, however, the governmental priority under § 64a(5) had been utilized almost solely by the United States directly [24]

16. NLRB v. Colten, 105 F.2d 179 (6th Cir. 1939) (back pay order enforced against estate of partner whose death terminated the partnership after order was issued).

17. *See* NLRB v. Hearst, 102 F.2d 650, 664 (9th Cir. 1939) (back pay order is enforceable even where reinstatement is impossible because employee died after order was issued).

18. *See* Waterman S.S. Corp. v. NLRB, 119 F.2d 760, 763 (5th Cir. 1940) (back pay order in favor of seamen is enforceable although employer subsequently sold ship).

19. The procedure whereby the NLRB must obtain judicial *enforcement* of its order in a circuit court under § 10(e) of the National Labor Relations Act would not seem to affect the order's finality. The scope of the circuit court's jurisdiction is identical whether the Board seeks enforcement under § 10(e) or an aggrieved person seeks *review* under § 10(f). Moreover, § 10(b) requires the Board to adopt so far as practicable in its proceedings the Federal Rules of Civil Procedure, which brings the Board closer to a purely judicial function than most administrative agencies. § 10(g) provides that commencement of proceedings under either § 10(e) or § 10(f) shall not operate as a stay of the Board's order unless specifically ordered by the court. 61 STAT. 146 (1947), 29 U.S.C. § 160 (Supp. 1947).

20. See Comments cited note 7 *supra.*

21. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 267 (1940).

22. NLRB v. Stackpole Carbon Co., 128 F.2d 188 (3d Cir. 1942). Nor may the back pay allowance be garnished from the employer by the employee's creditors. NLRB v. Sunshine Mining Co., 125 F.2d 757 (9th Cir. 1942).

23. National Licorice Co. v. NLRB, 309 U.S. 350 (1940).

24. The major exception has been the series of relatively recent FHA cases. *E.g.*, Korman v. FHA, 113 F.2d 743 (D.C. Cir. 1940); *In re* Weil, 46 F. Supp. 14 (M.D. Pa. 1942). It should be noted that § 64a(5) gives fifth priority only to debts entitled to priority "by the laws of the United States." It has been generally said, therefore, that another law is necessary to give claims of the United States the fifth priority under the Bankruptcy Act. See COLLIER, BANKRUPTCY § 64.502 (14th ed. 1941). This law is the long-standing REV. STAT. § 3466 (1875), 31 U.S.C. § 191 (1946), which gives the government first satisfaction against its insolvent debtors.

or by sureties bound to the United States.[25] Claims of governmental priority filed in bankruptcy proceedings by other governmental agencies, such as the Federal Housing Administration[26] or the Emergency Fleet Corporation,[27] provide little precedent for ruling on the status of an NLRB claim, because of the uniqueness of the statutory scheme that requires the employer to repair for his unfair labor practices. The thrust of the National Labor Relations Act back pay provisions would appear to be aimed at placing discriminatorily discharged employees in the same economic position as those employees retained.[28] Employees retained by an employer who subsequently becomes bankrupt are entitled to second priority for their wages earned within the time and amount limitations of § 64a(2).[29] The policy of the National Labor Relations Act, therefore, operating within the requirements of the Bankruptcy Act, would seem to suggest that discharged employees who have been awarded back pay receive like treatment. This is the result reached by the Eighth Circuit Court in the *Killoran* case.[30] In the instant case such treatment would have left the back pay order without any priority, since the period for which back pay was ordered, and even the order itself, did not come within the three month limitation of § 64a(2).[31] The probable rationale for the limitations on wage priority is that if an employee chooses to remain with his employer unpaid for longer than three months, or until the employer owes him more than $600 in wages, he voluntarily takes his chances as a general creditor for the additional time and amount. The rationale does not apply, however, where an employee has been put out of employment involuntarily, and is subsequently allowed back pay for the period of involuntary discharge by the NLRB. The fact is that any analogy between a Board order and the priority categories of § 64 will be inexact. What order of priority, if any, a back pay allowance should receive in the distribution of a bankrupt em-

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The first satisfaction is superseded by the fifth priority of § 64a(5) insofar as the insolvent becomes a bankrupt within the meaning of the Bankruptcy Act. The court in the instant case apparently disregarded this technical route in giving the NLRB claim priority under § 64a(5).

25. *E.g.*, Bramwell v. U.S. Fidelity Co., 269 U.S. 483 (1926).

26. Korman v. FHA, 113 F.2d 743 (D.C. Cir. 1940) (claims of government agency is entitled to priority in bankruptcy proceedings as a debt owing to United States); United States v. Summerlin, 310 U.S. 414 (1940) *semble*. *But see* United States v. Emory, 314 U.S. 423, 434n.2 (1941) (dissenting opinion). *Cf.* United States v. Remund, 330 U.S. 539 (1947) (debt owing to Farm Credit Administration is debt owing to United States within REV. STAT. § 3466).

27. U.S. Emergency Fleet Corp. v. Wood, 258 U.S. 549, 570 (1922) (claim of government corporation is not entitled to priority in bankruptcy proceedings as a debt owing to United States).

28. See cases cited note 15 *supra*.

29. See note 8 *supra*.

30. *Cf.* Social Security Bd. v. Nierotko, 327 U.S. 358 (1946) (NLRB back pay award constituted "wages" within meaning of Social Security Act); *In re* Public Ledger, Inc., 161 F.2d 762 (3d Cir. 1947) (vacation pay held to be "wages earned" within meaning of § 64a(2)).

31. Strom v. Peikes, 123 F.2d 1003 (2d Cir. 1941) (under § 64a(2) the only wages entitled to priority are those earned within three months before date when bankruptcy petition is filed); 51 YALE L.J. 863 (1942).

ployer's assets is a question not answered by either the National Labor Relations Act or the Bankruptcy Act. The most that can be said concerning the court's answer in the instant case is that, in the absence of a more specific legislative provision, it resolved the policies of the two acts in favor of the workmen discharged for union membership and against the general corporate creditors.

CONFLICT OF LAWS—TRADE-MARKS—EFFECT OF LANHAM ACT ON UNITED STATES TRADE-MARKS REGISTERED BY NON-OWNER IN A FOREIGN COUNTRY—Bulova Watch Company, a New York corporation, sued a United States citizen whose domicile was in Texas, seeking to enjoin him from using the name "Bulova" on watches sold by him in Mexico. It appeared that in 1933 the defendant, discovering that the name "Bulova" was not registered in Mexico, had the name registered himself. Thereafter until the present suit he had watch parts shipped from Switzerland and the United States to Mexico and assembled there, stamping the name "Bulova" on the completed product. When the plaintiff received numerous complaints from purchasers of the spurious "Bulova" watches, it instituted cancellation proceedings and an action for trade-mark infringement in Mexico. To date the plaintiff has not been successful in this litigation. At the same time, the instant suit was brought in the district court at the defendant's domicile. The court of appeals, reversing the district court's dismissal of the complaint for lack of jurisdiction over the subject matter, held that the federal courts may enjoin a United States citizen from trade-mark infringement and unfair competition in a foreign country even though the act complained of might not constitute an actionable wrong there. *Bulova Watch Co. v. Steele,* 194 F.2d 567 (5th Cir. 1952).

The problem presented by the instant case is not the existence of jurisdiction, but the propriety of exercising it. Under conflict of laws rules as generally stated, the creation of tort liability is governed by the law of the place where the alleged wrong occurred, and the place of the wrong is where the last act occurred.[1] In the case of trade-mark infringement, the place of wrong is where the customer was deceived by the defendant's offer.[2] Since all sales were made in Mexico, it would seem that Mexican law should apply, and under Mexican law the defendant's acts were not illegal or tortious. However, the courts of this country have been willing to make numerous exceptions to these rules. One of these is the public policy exception which justifies the non-application of foreign law which is offensive to the policy of the forum. However, only rarely will

1. RESTATEMENT, CONFLICT OF LAWS § 377 (1934). See Holmes, J., in American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909), ". . . the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."

2. RESTATEMENT, CONFLICT OF LAWS § 377, illustrations 5, 6 (1934).

the doctrine be utilized to disregard a foreign law favoring the defendant.[3] Another exception is found where the wrongful act complained of is an element of an over-all scheme partly occurring in this country. This approach ignores the "last act" rule. In *Vacuum Oil Co. v. Eagle Co.*,[4] plaintiff sought to enjoin defendant from infringing its trade-mark. The defendant, a New Jersey corporation, shipped oil in barrels to Germany, where its German manager marked the barrels with plaintiff's mark and sold them. Although the wrong was not consummated until the sale in Germany and defendant's activities were not shown to be unlawful under German law, the court granted relief, finding that the scheme resulting in the infringement originated and was largely executed in this country.[5] However, a subsequent case, *Luft v. Zande*,[6] in effect repudiated the *Vacuum Oil* doctrine. Plaintiff, owner of the "Tangee" trade-mark, identifying a well-known lipstick, sought to enjoin a competitor and deliberate infringer from using a deceptively similar name on his product, which was shipped to all parts of the world. With respect to defendant's activities in "countries where both parties [were] doing business and defendants [had] established their right by local law to use the name 'Zande'," [7] the court refused to grant relief, on the ground that to do so would give U. S. trade-marks an extraterritorial effect. The court made its ruling despite proof that all shipments were made and all activities directed from the United States.

A final theory by which the courts have circumvented the strict conflict of laws rules is to find that defendant's acts, although legal by the foreign law, have had an unlawful effect on United States commerce. In a leading case, *United States v. Sisal Sales Corp.*,[8] the government sought to enjoin violations of the Sherman and Wilson Acts. Defendants, through procurement of discriminatory legislation in Mexico and Yucatan, had established a monopoly over sisal in interstate and foreign commerce. The Supreme Court affirmed the granting of an injunction, saying that, although the monopoly was consummated in foreign countries, defendants "brought about forbidden results in the United States." [9] This is the theory relied upon in the instant case. There was testimony to the effect that large numbers of American tourists, especially those living near the border, bought defendant's spurious "Bulova" watches in Mexico and brought them back into this country. Thereafter, plaintiff received numerous complaints

3. See Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 747 (1924).

4. 154 Fed. 867 (C.C.D.N.J. 1907), *aff'd*, 162 Fed. 671 (3d Cir. 1908), *cert. denied*, 214 U.S. 515 (1909).

5. See also Hecker H-O Co. v. Holland Food Corp., 36 F.2d 767 (2d Cir. 1929).

6. 142 F.2d 536 (2d Cir. 1943), *cert. denied*, 323 U.S. 756 (1944).

7. *Id.* at 540.

8. 274 U.S. 268 (1927).

9. *Id.* at 276. This case has also been interpreted to illustrate the public policy theory. See 4 CALLMAN, UNFAIR COMPETITION AND TRADE-MARKS 2240 (1950). For other cases using the effect on commerce theory, see, *e.g.*, Thomsen v. Cayser, 243 U.S. 66 (1917); United States v. Hamburg-Amerikanische Paketfahrt Aktiengesellschaft, 200 Fed. 806 (C.C.S.D.N.Y. 1911).

about them. The Lanham Trade-Mark Act,[10] in which Congress, for the protection of American marks, used its powers under the Commerce Clause[11] to the fullest extent,[12] prohibits the importation of products copying the name of any domestic manufacturer.[13] That provision was ineffective to check the practice of tourists bringing back watches purchased in Mexico. The court found that the defendant's activities not only produced a substantial effect on foreign commerce[14] contrary to Congressional Protective intent but also resulted in an injury to plaintiff's reputation in domestic commerce. Therefore, this was deemed an appropriate case in which to exercise jurisdiction.

Protection against trade-mark infringement in foreign countries presents a serious problem to American owners of marks. This is especially true in Latin and South American countries, into whose markets United States manufacturers are entering in increased numbers. The law in most of those countries, as in Mexico, is that the first registrant, not the first user, is entitled to the mark.[15] Cancellation proceedings in those countries generally are lengthy and expensive, and there is often small chance for success.[16] Hence when a defendant, subject to the jurisdiction of this country's courts, is shown to be acting in bad faith in such a way that his activities have a detrimental effect upon commerce, it seems desirable for our courts to enjoin those activities. However, one danger of exercising jurisdiction in this type of situation should be taken into account. While courts have not been reluctant to enjoin a defendant from doing an act abroad, they have consistently refused to order him to do an act in a foreign state, on the ground that the latter might place him in the position of being forced to perform an act illegal by local law, which in turn would amount to an unwarranted interference with the affairs of the foreign state.[17] The distinction between an injunction and an affirmative order has been criticized.[18] Prohibition to perform an act may lead to a breach

10. 60 STAT. 427 (1946), 15 U.S.C. § 1051 *et seq.* (1947).

11. U.S. CONST. Art. I, § 8.

12. See Robert, *Commentary on the Lanham Trade-Mark Act* in 15 U.S.C.A. § 1050 at 268-269 (1948).

13. 60 STAT. 440 (1946), 15 U.S.C. § 1124 (1947).

14. It is not clear what constitutes the foreign commerce to which the court refers. Bulova is now advertising in Mexico, and the unfair use of its trade name in Mexico affects prospective if not present foreign commerce. The court also mentioned the defendant's purchase of watch cases and dials in the United States, which unquestionably is foreign commerce.

15. See Wilson, *Trade-Marks and Laws in Foreign Countries,* 37 T.M. REP. 107, 114 (1947).

16. Mexico is a member of the International Convention for the Protection of Industrial Property. Article 6 *bis* of the Convention provides that a foreign owner's mark, well known in the foreign country, shall be protected against registration of an infringing mark provided that cancellation proceedings are filed within three years from the date of the infringing registration, or at any time in the case of fraud. The Inter-American Convention of 1929 contains stronger provisions for the protection of a prior user, but it has not been ratified by Mexico. Ladas, *Trade-Marks and Foreign Trade,* 38 T.M. REP. 278 (1948).

17. See 1 BEALE, THE CONFLICT OF LAWS §§ 94.2, 96.1 (1935).

18. GOODRICH, CONFLICT OF LAWS § 75 (2d ed. 1938).

of contract binding under the local law. In the instant case, conformance with the injunction might lead to fewer sales, so that the defendant might not be able to honor agreements and obligations made under local law in anticipation of normal continuation of the business. But if the courts weigh this factor in deciding the propriety of granting injunctive relief in a particular case, there appears to be no other reason why the theory of the instant case should not be employed to protect American owners of trade-marks against fellow citizens acting in bad faith.

CONSTITUTIONAL LAW—STATUTORY PRESUMPTIONS—UNEXPLAINED MEMBERSHIP IN AN ORGANIZATION, KNOWING IT TO BE SUBVERSIVE, GROUNDS FOR DISMISSAL OF PUBLIC SCHOOL TEACHER—Section 12-a of the New York Civil Service Law, enacted in 1939, authorizes the disqualification of applicants for state jobs and the removal of jobholders who advocate the forceful overthrow of government. The section provides de novo review for aggrieved persons, and places the burden of sustaining ineligibility upon the state. Although no proceedings were ever taken under this statute, the legislature in 1949 passed the Feinberg Law,[1] which directs the Board of Regents to adopt regulations for the rigorous enforcement of § 12-a in the public school system and to make a listing, after notice and hearing,[2] of organizations advocating the overthrow of government. The law further provides that membership in a listed organization is prima facie evidence of ineligibility. Among the rules adopted pursuant to this authorization is a presumption that once membership in an organization is established, it continues until shown to have been terminated in good faith.[3] Before any proceedings were instituted, a group of parents, teachers and taxpayers brought suit for declaratory judgment and to enjoin enforcement of the unexecuted scheme, alleging that it violated the First and Fourteenth Amendments to the Federal Constitution. The New York Court of Appeals [4] upheld the validity of the Feinberg Law as limited by the interpolation that it applies only to persons holding membership in a listed organization with knowledge of its subversive purpose.[5]

1. N.Y. EDUCATION LAW § 3022 (Supp. 1951). The Feinberg Law also supplements N.Y. EDUCATION LAW § 3021 (1946), enacted in 1917, which makes the utterance of treasonable words or commission of treasonable acts grounds for dismissal of a teacher.

2. In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), the court held that when an organization is listed as subversive as a step precedent to the removal of disloyal federal employees, a hearing is necessary at some stage of the proceedings prior to dismissal. The Board of Regents is authorized to use the federal listing.

3. 1 N.Y. CODES, RULES AND REGS., pp. 205-206, § 254 (5th Supp. 1950).

4. Thompson v. Wallin, L'Hommedieu v. Board of Regents, Lederman v. Board of Education, 301 N.Y. 476, 95 N.E.2d 806, 49 MICH. L. REV. 1219 (1951), *affirming* 276 App. Div. 527, 96 N.Y.S.2d 466 (2d Dept. 1950).

5. That this was the intent of the Court of Appeals is not certain from the language that anyone may be declared ineligible "who knowingly holds membership in an organization named upon any listing." 301 N.Y. 474, 494, 95 N.E.2d 806, 814 (1951). The Supreme Court read this to mean knowledge of the purposes of the organization. Instant case at 386.

The United States Supreme Court affirmed, holding, first, that a state may deny employment in its schools to one advocating the overthrow of the government by force, and second, that such ineligibility may be presumed from a showing that one was a member of a listed organization with knowledge of its advocacy of the forceful overthrow of government. *Adler v. Board of Education,* 72 Sup. Ct. 380 (1952).

The first proposition is not surprising in light of prior case law. A number of recent decisions have established that a sovereign-employer may reasonably restrict the rights of its citizen-employees for the advancement of the public service.[6] A state may require a loyalty oath or affidavit disclosing previous dealings with subversive organizations from political candidates[7] and public employees[8] to assure the fidelity of public servants to the fundamental tenets of its scheme of government. Judicial opinions frequently refer to public employment as a privilege and not a right,[9] but since it is undisputed that a state cannot deny employment on the basis of color or creed,[10] talk of privilege represents only a legal conclusion supporting the qualification in question. In the instant case, against the state's vital concern with the forces at work in its school system, there must be balanced the harms implicit in any governmental supervision of expression or association, plus the destruction of the professional careers[11] of the dismissed teachers. Less of a "clear and present danger"[12] appears to be required to justify legislative fetters on freedom of expression in areas where

6. *See, e.g.,* United Public Workers v. Mitchell, 330 U.S. 75 (1946), 32 MINN. L. REV. 176 (1948) (held valid the limitations on political activity of federal employees imposed by the Hatch Act); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir.), 99 U. OF PA. L. REV. 98, *affirmed* without opinion by an equally divided Court, 341 U.S. 918 (1950) (denied the right of confrontation to federal employee discharged as disloyal).

7. Gerende v. Board of Supervisors of Baltimore, 341 U.S. 56 (1950) (oath required affirmation that candidate was not knowingly a member of a subversive organization).

8. See Frankfurter, J., concurring-dissenting in Garner v. Los Angeles Board of Public Works, 341 U.S. 716, 725 (1950) (a city ordinance's requirement of a loyalty oath and an affidavit disclosing prior communist activity was held to be reasonable and non-compliance a ground for dismissal).

9. See, *e.g.,* McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), and cases cited in note 6 *supra.*

10. *See* United Public Works v. Mitchell, 330 U.S. 75, 100 (1946).

11. "A loyalty trial is the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice." Douglas, J., concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 180 (1950).

12. This test was announced in Schenck v. United States, 247 U.S. 47, 52 (1919). In subsequent application of that test it has been held that mere membership in an organization advocating the forceful overthrow of government cannot be made criminal. De Jonge v. Oregon, 299 U.S. 353 (1937). *But cf.* Dennis v. United States, 341 U.S. 494 (1951). Dismissal of course is not a criminal sanction, but it is a severe civil penalty and the distinction between the two cannot be pressed too far. See Bridges v. Wixon, 326 U.S. 135, 147 (1944); United States v. Lovett, 328 U.S. 303 (1945). In addition, unlike the anti-syndicalism statutes which applied to all, the Feinberg Law applies only to persons with a special relation to the state.

the sovereign has regulatory power beyond the police power—*e.g.*, control of commerce or the public service.[13] But even in these special zones the constitutional question may turn upon the impact on individuals of the procedures utilized to reach the intended results.

The procedural innovation of the Feinberg Law is a resort to presumptions to make the state's initial case and place upon the accused the burden of bringing forward evidence in rebuttal. The Supreme Court accepted these rebuttable presumptions, finding in them the requisite rational connection between the facts proved and the facts presumed,[14] *i.e.*, that from membership in a listed organization with awareness of its subversive purposes may be implied personal advocacy of those purposes; and that membership once established may be presumed to continue until the contrary is shown. However, variations of these presumptions, either in their application in New York or in imitative statutes, may raise serious constitutional questions. For example, if a law provided or was in practice so applied that the single fact of earlier membership, even if subsequently discontinued, was sufficient for dismissal, the inference of disloyalty from that finding would be far more tenuous, and a presumption of advocacy of subversion resting on such a factual base might well be invalid.[15] The same might be true of a provision decreeing ineligibility on a finding of membership in a listed organization even without knowledge of its purpose.[16] Under New York law a presumption of fact vanishes entirely when "substantial" evidence to the contrary is introduced, and does not operate to shift the risk of non-persuasion.[17] In jurisdictions where a presumption is evidence or shifts the risk of non-persuasion, that increased burden on the employee will be an additional factor adverse to the constitutionality of legislation otherwise comparable to the New York provisions.

The practical effect of the Feinberg Law will depend in large measure on two undetermined questions of evidence: first, what evidence tending to show membership with knowledge of subversive purpose is sufficient to form a prima facie case, and second, what constitutes "substantial" evi-

13. See American Communications Ass'n v. Douds, 339 U.S. 382, 99 U. OF PA. L. REV. 409 (1950) (use of NLRB facilities denied to unions whose officers did not submit non-communist affidavits according to the terms of the Taft-Hartley Law, which requires the affidavit in order to prevent obstruction of interstate commerce); United Public Workers v. Mitchell, note 6 *supra*.

14. The limitations on legislative power to promulgate presumptions are described in Mobile, Jackson & Kansas City RR. v. Turnipseed, 219 U.S. 35 (1910): Morrison v. California, 291 U.S. 82 (1934). *But cf.* Tot v. United States, 319 U.S. 463, 467 (1943).

15. If membership antedated the enactment of § 12-a, there is a strong probability that such a provision would also be ex post facto. See Garner v. Los Angeles Board of Public Works, 341 U.S. 716, 721 (1950).

16. See Garner v. Los Angeles Board of Public Works, 341 U.S. 716, 723-4 (1950).

17. Kennell v. Rider, 225 App. Div. 391, 233 N.Y. Supp. 252 (3d Dept. 1929), *affirmed*, 252 N.Y. 602, 170 N.E. 159 (1930); Potts v. Pardee, 220 N.Y. 431, 116 N.E. 78 (1917).

dence adequate to rebut the resulting presumptions of advocacy and of continuing membership. Ordinarily it will be extremely difficult to prove that a teacher knew the purposes of a listed organization without heavy reliance on inferences from the notoriety of those purposes or from the knowledge of a reasonable man under the circumstances. It is possible that in practice knowledge will be inferred from little more than the fact of membership, which is a position far removed from the requirement of actual knowledge in the statute as sustained. If the Board establishes knowledge by a preponderance of the evidence, there remains the problem of whether a teacher's flat denial of advocacy of overthrowing government or his assertion of a different purpose in membership will be "substantial" evidence sufficient to overcome the prima facie case. The point is important, for generally little corroborative evidence will be available. These operational uncertainties prompted the dissent of Justice Frankfurter,[18] who challenged the wisdom of deciding the validity of a complex statutory scheme without a concrete case before the Court and before the Board of Regents had demonstrated in practice the procedural and evidentiary safeguards that would be employed. With so much of the procedure still nebulous, and with the extent of the inhibitions upon free association undefined, Justice Frankfurter's position serves to emphasize the narrowness of the holding. The instant case decided only that if the procedures of the Feinberg Law, as construed by the Court of Appeals, are strictly applied, no question of procedural due process arises. If departures from this procedure bring a new case before the Court, perhaps fuller recognition will then be given to the tremendous impact of a loyalty trial upon the individual and the dangers of enforced educational orthodoxy inherent in such legislation.[19]

CONSTITUTIONAL LAW—HUMAN RIGHTS PROVISIONS OF U. N. CHARTER NOT SELF-EXECUTING—ALIEN LAND LAWS DENIAL OF EQUAL PROTECTION—California's alien land laws [1] forced escheat of lands belonging to an alien Japanese, ineligible for citizenship under federal naturalization laws. On appeal from the judgment of escheat, the District court of appeals reversed, holding that the human rights provisions of the United Nations

18. Instant case at 387. Justice Frankfurter would have dismissed for lack of standing of the parties and insufficient ripeness of the constitutional question: the parents and taxpayers' injuries were too speculative, and the teachers' had suffered no injury, on the basis of United Public Workers v. Mitchell, 330 U.S. 75 (1946).

The majority of the Court did not discuss the jurisdictional issue or attempt to distinguish Doremus v. Board of Education, 72 Sup. Ct. 394 (1952), decided the same day, in which it was held that taxpayers had no standing to challenge a New Jersey statute requiring daily Bible reading in state schools.

19. See the dissents of Black and Douglas, JJ., instant case at 387, 392.

1. CAL. GEN. LAWS Act. 261, §§ 1, 2, 7 (Deering, 1944).

Charter [2] had become part of the supreme law of the land [3] and are "paramount to every law of every state in conflict with [it]." [4] The California Supreme Court rejected the treaty argument as a basis for overturning the statute, holding that the charter is not self-executing and requires congressional implementation before it becomes binding upon the courts. Instead, the court held the statute unconstitutional as a denial of equal protection guaranteed by the Fourteenth Amendment. *Sei Fujii v. California,* 242 P.2d 617 (Cal. 1952).

In rejecting the U. N. Charter as the basis for voiding the alien land law, the court reached a not unexpected result.[5] Inasmuch as Congress has passed no laws to effectuate the charter provisions in question, the California statute would be invalidated by those provisions only if the charter could operate "by the force of the instrument itself." [6] The distinction between self-executing and non-self-executing treaties was first enunciated by Chief Justice Marshall in *Foster v. Neilson.*[7] Only the former immediately bind the courts and supersede all inconsistent legislation; [8] the others must first address themselves to Congress for enabling legislation.[9] Whether a particular treaty is to be treated as self-executing depends upon the intent of the contracting parties as manifested by the language of the document, its subject matter, and the circumstances under which it was executed.[10] It is possible that the treaty itself will stipulate that it will be non-self-executing.[11] In the absence of an express statement of its effect, the construction of the treaty is properly for the court.

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2. U.N. CHARTER Art. 1: "The purposes of the United Nations are:

". . .

"(3) To achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;"

Article 55(c) provides that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion."

Article 56: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

3. U.S. CONST. Art. VI: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;"

4. Sei Fujii v. California, 217 P.2d 481, 488 (Cal. App. 2d Dis. 1950).

5. See 99 U. OF PA. L. REV. 253 (1950); Hudson, *Charter Provisions on Human Rights in American Law,* 44 AM. J. INT'L. L. 543 (1950). But see Wright, *National Courts and Human Rights—The Fujii Case,* 45 AM. J. INT'L. L. 62 (1951).

6. *Cf.* United States v. Perchman, 7 Pet. 51, 88-89 (U.S. 1833).

7. 2 Pet. 253 (U.S. 1829).

8. Clark v. Allen, 331 U.S. 503 (1947); Bacardi Corp. of America v. Domenach, 311 U.S. 150 (1940).

9. Foster v. Neilson, 2 Pet. 253, 314 (U.S. 1829).

10. See Evans, *Some Aspects of the Problem of Self-Executing Treaties,* 1951 PROCEEDINGS, AM. SOC. INT'L. L. 66, 74; Chafee, *Legal Problems of Freedom of Information in the United Nations,* 14 LAW & CONTEMP. PROB. 545, 563 (1950).

11. Evans, *supra* note 10, at 74.

The language of the charter invoked in the instant case is of general scope. The Preamble and Article 1 state the collective purposes of the United Nations. Article 55 in part pledges members to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race. . . ." Article 56 pledges the members to take joint and separate action "for the achievement of the purposes set forth in Article 55." Thus, Article 56 would indicate an intent on the part of the signatories that the provisions are not self-executing as written. They create only an obligation to cooperate in promoting certain ends, which must await congressional implementation.[12] Besides the language of the charter, testimony prior to senate ratification indicates that this government's representatives in drafting the treaty believed the charter constituted only recommendations to the signing nations.[13] Buttressing this interpretation of these sections is the accepted canon for construing formal documents: when language is properly used in one portion of the instrument to achieve one result, the same effect will not be given to different language elsewhere in it. Other articles of the charter, granting diplomatic privileges and immunities,[14] manifest a clear intent to be self-executing and have been so held.[15] Since the same treaty may contain both self-executing and non-self-executing provisions,[16] it seems proper to deny self-executing effect to the human rights provisions in view of their language.

Although the charter itself does not supersede inconsistent state legislation, it does express a policy against discriminatory legislation to which courts will give weight.[17] Thus the California court in the instant case properly considered the ratification of the charter as one factor in approaching the constitutional question arising from the equal protection clause of the Fourteenth Amendment.

The equal protection clause applies in terms to all persons within the jurisdiction of the states, and it is well-settled that an alien may invoke the amendment's protection.[18] One of the rights protected by the amendment is the right to own, use, enjoy and dispose of property;[19] and although

12. Hudson, *supra* note 5, at 545.

13. *Hearings before Senate Committee on Foreign Relations on Charter of United Nations*, 79th Cong., 1st Sess. 45 (1945).

14. U.N. CHARTER Art. 104, 105.

15. Curran v. City of New York, 77 N.Y.S.2d 206 (1947). *Cf.* International Organizations Immunity Act, 59 STAT. 669 (1945), 22 U.S.C. § 288 (1946), made applicable to the United Nations by Exec. Order No. 9698, 3 CODE FED. REGS. 102 (Supp. 1946).

16. *See* Aguilar v. Standard Oil Co., 318 U.S. 724, 738 (1943) (concurring opinion).

17. *See Oyama v. California*, 332 U.S. 633, 649, 673 (1948) (concurring opinions); Kenji Namba v. McCourt, 185 Ore. 579, 606, 204 P.2d 569, 579 (1949); *Re* Drummond Wren, [1945] 4 D.L.R. 674, 677.

18. Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1885).

19. Shelley v. Kraemer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917).

the state may control the ownership of property within its boundaries in a legitimate exercise of police powers,[20] that control is subject to the proscriptions of the amendment. The question presented in this case is whether there is sufficient justification for the alien land laws as valid police regulation to permit the discriminatory effects which those laws produce. When the precise question was presented thirty years ago, the Supreme Court decided in the affirmative.[21] In *Terrace v. Thompson* [22] the Court held that a Washington statute prohibiting a non-declarant alien from owning land was valid, because the classification was reasonable in light of distinctions made in the immigration laws, and since the interests of non-citizen land-owners in the welfare of the state might properly be deemed suspect. In addition, the Court foresaw the possibility of aliens owning or controlling all land within the state.[23] On the authority of this decision the Court upheld the validity of the California land laws here in question.[24] Recent cases, however, have cast doubt on the continued vigor of these decisions. In *Takahashi v. Fish and Game Commission,*[25] the argument that federal naturalization classifications are automatically proper for state legislative purposes was rejected, and the burden was placed upon the states to justify a borrowed federal grouping in the same manner as any other classification it might seek to impose. The *Takahashi* case followed shortly upon *Oyama v. California,*[26] which held unconstitutional a presumption declared by the alien land laws. Four justices thought the entire statute unconstitutional, and that the cases supporting it should have been overruled. They concurred in the majority opinion of Chief Justice Vinson, which assumed the constitutionality of the statute *for the purposes of argument only.*[27] In light of these decisions and the heavy burden, imposed since the *Terrace* case, on a state seeking to impose classifications on the basis of race,[28] reexamination of the earlier decisions was proper. A decision need not be directly overruled before its binding effect ceases.[29]

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20. *E.g.,* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

21. Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923).

22. 263 U.S. 197 (1923).

23. *Id.* at 220-221.

24. Porterfield v. Webb, 263 U.S. 197 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb. 263 U.S. 326 (1923); *cf.* Cockrill v. California, 268 U.S. 258 (1925) (conspiracy to violate alien land laws).

25. 334 U.S. 410, 418-421 (1948); *see* Justice Murphy concurring in Oyama v. California, 332 U.S. 633, 664 (1948).

26. 332 U.S. 633 (1948).

27. *Id.* at 646.

28. Korematsu v. United States, 323 U.S. 214, 216 (1942); Oyama v. California, 332 U.S. 633, 646 (1948).

29. Thus, in Ribnik v. McBride, 277 U.S. 350 (1928) the Court held that a state could not constitutionally fix the maximum fee which a private employment agency might collect from an applicant for employment, since the business was not one "affected with a public interest." Subsequently in a series of cases the Court upheld the validity of price-fixing and wage and hour legislation, and finally, in Nebbia v. New York, 291 U.S. 502 (1934), rejected the "affected with a public interest" test for regulation of business. Then in 1940, the Nebraska Supreme Court, presented with

The decision in the instant case rests ultimately on the inability of the state to justify the statute on any grounds other than effectuating racial discrimination.[30] By invalidating the statute on this ground, the California court has brought itself in accord with the Oregon Supreme Court, which recently reconsidered and struck down a similar land law.[31] Utah has abrogated a comparable statute by legislation,[32] and the number of states with alien land laws is decreasing. Proposed legislation before Congress which would remove naturalization barriers against the last ethnic group presently ineligible for citizenship[33] will take the force from more state alien land laws discriminating against ineligible aliens.[34] In invalidating the land law on other grounds than the court below, the California court has removed a doubtful precedent and replaced it with a strong one.

CORPORATIONS—SECURITIES EXCHANGE ACT OF 1934—PARTIES PROTECTED AND TYPE OF TRANSACTION COVERED BY RULE X-10B-5—Defendant Feldmann, president of Newport Steel Corp., chairman of its board of directors and owner of voting control,[1] sold his stock to defendant Wilport Corp.[2] at a price twice the then market value.[3] Wilport thereby obtained a "captive" source of steel during the market shortage.[4] Feldmann and the other directors immediately vacated their positions which were filled by the individual defendants, officers and directors of Wilport, who subse-

a statute almost identical to that in the *Ribnik* case, considered *Ribnik* as controlling and invalidated the statute. The Supreme Court reversed, holding that the drift away from the earlier decision had destroyed it as precedent. Olsen v. Nebraska, 313 U.S. 236 (1941).

30. Although the statute applied to all ineligible aliens, its practical effects were felt solely by Japanese. The original act was passed in a time of racial ill-feeling. The dangers anticipated by Japanese tenancy did not and could not occur. The number of Japanese aliens in California is few and is growing even smaller. Their land holdings, percentagewise, are less than minimal. See, generally, McGovney, *The Anti-Japanese Land Laws of California and Ten Other States,* 35 CALIF. L. REV. 7 (1947); see also concurring opinion of Justice Murphy in Oyama v. California, 332 U.S. 633, 650-671 (1948).

31. Kenji Namba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949).

32. UTAH CODE tit. 78, c. 6a (Supp. 1951).

33. N.Y. Times, April 26, 1952, p. 1, col. 6.

34. In addition to the California-type statutes which bar all ineligible aliens from acquiring any property rights, *e.g.,* ARIZ. CODE ANN. 71-201 (1939), some states permit ineligibles to hold property only for a limited length of time, *e.g.,* MISS. CODE ANN. § 842, or bar non-resident ineligibles from holding, *e.g.,* TEX. CIV. STAT. ANN. tit. 1, art. 167 (Vernon, 1947). The statutes are collected in MURRAY, STATES' LAWS ON RACE AND COLOR (1950), an invaluable compilation for research in this area.

1. Feldmann owned approximately forty per cent of the common stock; the remaining stock being publicly held and scattered among thousands of small investors.

2. It was alleged that several weeks before the sale, Feldmann rejected an offer of merger with another company which would have been highly profitable to all the stockholders of Newport. Feldmann notified the stockholders of the rejection by mail.

3. The stockholders alleged that one-half of the amount was payment for control.

4. Wilport was a corporation formed by ten manufacturers of finished steel for the purpose of purchasing control of Newport.

quently sent a letter to the Newport stockholders reporting the Feldmann transaction, but failing to disclose the purchase price or that Newport was to become a captive subsidiary. Certain minority stockholders brought a representative suit alleging a violation of § 10(b) of the Securities Exchange Act of 1934[5] and Rule X-10B-5 of the SEC[6] in that defendants used the mails[7] to defraud the stockholders of Newport and the corporation in the sale of Feldmann's stock. The district court granted defendant's motion to dismiss for failure to state a cause of action, and the Court of Appeals for the Second Circuit, without deciding that defendant's conduct was fraudulent, affirmed on the grounds that the Securities Exchange Act § 10(b) and Rule X-10B-5 were aimed only at a fraud perpetrated upon a buyer or seller of securities and had no application to a breach of a fiduciary duty by a corporate insider resulting in fraud upon those who were not buyers or sellers. *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2nd Cir. 1952).

The federal government has enacted three general anti-fraud provisions, namely: § 17(a) of the Securities Act[8] which only applies to sales, § 15(c)(1) of the Securities Exchange Act[9] which applies to sales and purchases by brokers or dealers, and § 10(b) of the Securities Exchange Act which applies to both sales and purchases by anyone. Fraud as used in these provisions is undefined,[10] but because of the legislative background it seems reasonable to assume that, at the very least, the most liberal common law requirements of deceit govern. Because § 10(b) was not self executing,[11] these provisions failed to cover a fraud on a seller of securities by the purchaser if the latter was not a broker or a dealer. To correct this serious defect the SEC[12] acting under § 10(b) adopted Rule X-10B-5 which merely borrows the language of § 17(a) of the Securities Act adding a phrase covering fraud "upon any person, in connection with

5. 48 STAT. 881, 891 (1934), 15 U.S.C. § 78 (1946).

6. Exchange Act Release No. 3230 (May 21, 1942), 17 CODE FED. REGS. § 240.10b-5 (1949).

7. The use of the mails or other instrumentality of interstate commerce was required for a violation of Rule X-10B-5.

8. 48 STAT. 84 (1934), 15 U.S.C. § 77q (1946).

9. 49 STAT. 1378 (1936), as amended, 15 U.S.C. § 780(c) (1946).

10. Courts have repeatedly said that the fraud provisions are not limited to circumstances giving rise to a common law action for deceit. Norris & Hirshberg, Inc. v. SEC, 177 F.2d 228, 233 (D.C. Cir. 1949); Speed v. Transamerica Corp., 71 F. Supp. 457 (D. Del. 1947).

11. § 10(b) is not operative in the absence of specific rules.

12. In the revision program of 1941 the SEC and the Securities Industry suggested an amendment to extend § 17(a) of the Securities Act to cover purchases, but due to the war this program was abandoned. See *Hearings before House Committee on Interstate and Foreign Commerce on a Comparative Print Showing Proposed Changes in the Securities Act of 1933 and the Securities Exchange Act of 1934, etc.*, 77th Cong., 1st Sess. 856-7 (1941); REPORT ON THE CONFERENCE WITH THE SECURITIES AND EXCHANGE COMMISSION AND ITS STAFF ON PROPOSALS FOR AMENDING THE SECURITIES ACT OF 1933 AND THE EXCHANGE ACT OF 1934, 164-167 (1941).

the purchase or sale of any security." [13] An SEC press release,[14] a district court case without an opinion,[15] and the instant case are the only authorities as to the scope of these words.[16]

In the present case it was contended that the proscription of fraud "upon any person" included the common law liability of those who abuse the trust of their corporate positions "in connection with the purchase or sale of any security," and that the applicability of Rule X-10B-5 was not limited to actual purchasers or sellers of securities. The court rejected this contention holding that the words "any person in connection with the purchase or sale" defined the class protected by the rule.[17] Accordingly, even assuming that the minority stockholders were defrauded, they could not recover in this action since they were outside the class protected by Rule X-10B-5. Though on the facts of this case the result is persuasive, it should be noted that this decision need not be interpreted as restricting the scope of the rule to situations where there is privity of sale or purchase with the defrauder. To do so would not only disregard the fact that the word "sale" which appears in § 17(a) is repeated in § 10(b) and in X-10B-5,[18] but would exclude situations which clearly fall within the purpose of the statute.[19]

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13. § 17(a)(3) of the Securities Act renders it unlawful, "to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser." § X-10B-5(3) reads: "to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit *upon any person, in connection with* the purchase *or sale* of any security." [Italics supplied.]

14. The court relied on Securities and Exchange Commission Release No. 3230 which states at page 183, 184: "The Securities and Exchange Commission today announced the adoption of a rule prohibiting fraud by any person in connection with the purchase of securities. The previously existing rules against fraud in the purchase of securities applied only to brokers and dealers. The new rule closes a loophole in protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase. . . ."

15. McManus v. Jessup & Moore Paper Co., Civ. No. 8015, E.D. Pa., July 30, 1948 (plaintiffs, minority stockholders of the Paper Co., complained that the sale by former majority stockholders and the management of their stock to the N.Y. Post Corp. at a large profit was effected by fraud. Though the plaintiffs were not parties to the sale transaction, Judge Bard entered an order denying a motion to dismiss without opinion).

16. See Loss, SECURITIES REGULATION (1st ed. 1951).

17. Although the court based its conclusion partly on legal history, that history only shows that the present situation was not considered.

18. This repetition purports to give sellers as well as purchasers some additional rights. One of these rights would seem to be freedom from the privity requirement of § 17(a) which proscribes fraud only "in the sale of securities", while X-10B-5 reads "in connection with the sale of securities". This reading allows recovery in the situations of note 19 *infra*.

19. The following are illustrations where Rule X-10B-5 should apply and which fall within the purpose of the Securities Act:

(a) The president of a corporation, knowing oil was just discovered on the corporation's land, sends a letter to all stockholders in which he does not disclose the oil discovery, but in which he offers to purchase their stock at X dollars. S sells to the president, and Y, relying on the president's quoted price as the fair value, sells his stock to a third person at that price or makes a gift of it using the quoted price as an indication of its worth. S can sue for damages and rescind—Y should be allowed a suit for damages.

The result in the instant case could have been reached by reasoning tending to have a less restrictive effect upon the coverage of Rule X-10B-5.[20] Instead of deciding the scope of the words "any person" the court could have clearly placed its decision on the broader grounds of whether the fraud pleaded, *i.e.,* a transaction which primarily involved fraudulent mismanagement resulting in a violation of a fiduciary relationship,[21] was the "fraud" which the rule was intended to cover[22] A negative answer would be indicated, in view of the fact that all action taken by the SEC under the securities regulation has concerned the disclosure of inside information in connection with sales or purchases of securities. The SEC has never attempted to monitor the field of corporate management or to correct the many and varied abuses of corporate fiduciary relationships. Whether or not it has that power,[23] there should be a clearer manifestation of intent to exert it than is found in the words "upon any person, in connection with the purchase or sale of any security." The court at the end of its opinion seems to follow this reasoning as it states ". . . that section [10(b)] was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement of corporate affairs. . . ." If courts in the future will restrict the holding in the instant case to the immediate quoted phrase, the vitality of Rule X-10B-5 will not be seriously impaired.

(b) An insider, who knows Z stock is worth twice its current market value, places a purchase order with broker A. Broker A circulates a purchase order on the over-the-counter market. Broker B solicits from investor X and fills A's order, A in turn delivering the stock to the insider. X should be allowed to sue the insider.

20. See an excellent note, *The Prospects for Rule X-10B-5: an Emerging Remedy for Defrauded Investors,* 59 YALE L.J. 1120, 1137 (1950).

21. Under the facts pleaded it is doubtful whether plaintiffs have made out a common law cause of action. The theory would be a violation of a duty imposed on a corporate official who is a majority stockholder not to sell his control to anyone who he knows or has reason to know will "fleece" the corporation. See Insuranshares Corp. of Del. v. Northern Fiscal Corp., Ltd., 35 F. Supp. 22 (E.D. Pa. 1940); Dale v. Thomas H. Temple Co., 186 Tenn. 86, 208 S.W.2d 344 (1948); Gerdes v. Reynolds, 28 N.Y.S.2d 622 (Sup. Ct. 1941).

22. In the instant case the letters were not part of the scheme to defraud nor did they give rise to the cause of action; *i.e.,* if the letters had stated that the corporation was to become a captive subsidiary the common law cause of action, if it existed at all, would still exist regardless of the disclosure in the letters. The important advantage plaintiffs would derive from bringing their action under the Securities Act would be in the liberal service and venue provisions of § 29(b), 48 STAT. 903, as amended by, 52 STAT. 1076 (1938), 15 U.S.C. § 78cc(b) (1946).

23. Mr. Corcoran, one of the drafters of the Securities Exchange Act stated that the Act was aimed at four general fields: (1) control of credit in the stock market, (2) protection of investors from manipulation of the stock market machinery, (3) protection of investors from exploitation by corporate insiders. In explanation of (3) he stated: "Lack of information on the part of investors and ignorance of what they are buying is one of the real factors. . . ." The last field (4) concerns regulation of the over-the-counter market in unlisted securities in order to protect listed securities from having the provisions of this law so burdensome on them that a corporation with unlisted securities will be in a preferable position. *Hearings before Senate Committee on Banking and Currency on S. Res. 84, 56, and 97,* 93d Cong., 1st Sess. 6465-6. Note that none of these fields include corporate mismanagement.

INCOME TAXATION—DEDUCTIONS—"PUBLIC POLICY" AND THE "ORDINARY AND NECESSARY" REQUIREMENT [1]—Pursuant to agreements reflecting an established and widespread practice in the optical business, taxpayer opticians paid to oculists who prescribed the eyeglasses which they (the opticians) sold, one-third of the sale price of the glasses. No state or federal statute prohibited such "kickbacks." [2] Taxpayers treated these payments to the doctors as ordinary and necessary expenses of carrying on business [3] and deducted them from their gross income.[4] In 1943 and 1944 the Commissioner of Internal Revenue disallowed the deduction. The Tax Court sustained the Commissioner's determination, holding that the payments were contrary to public policy and, therefore, not deductible.[5] The Court of Appeals affirmed this decision.[6] The United States Supreme Court reversed, holding that the "kickbacks" were deductible because they were ordinary and necessary business expenses. *Lilly v. Commissioner,* 72 Sup. Ct. 497 (1952).

Sec. 23(a)(1)(A) of the Internal Revenue Code allows deductions of all "ordinary and necessary" business expenses.[7] Courts have in general looked toward public policy considerations to determine whether such expenses should be deductible. Penalties incurred by violations of statutes [8] and illegal payments of bribes [9] have been held to be non-deductible. Expenses of operating illegal businesses obtain no clear cut rule. Courts apparently allow deductions for expenses normally associated with running a business but as to less usual expenses speak of public policy.[10] Prior to 1943, where no specific statute had been violated certain expenses of an

1. See generally, 4 MERTENS, LAW OF FEDERAL INCOME TAXATION §§ 25.102-25.105 and §§ 25.35-25.37 (1942); Notes, 51 COL. L. REV. 752 (1951), 54 HARV. L. REV. 852 (1941).

2. In 1951 taxpayers' state (North Carolina) passed a law outlawing the practice. N.C. GEN. STAT. c. 1089, § 23 (1951). Washington and California also have laws against such "kickback" agreements. WASH. REV. STAT. ANN. § 10185-14 (Supp. 1949); CAL. BUSINESS AND PROFESSIONS CODE §§ 650, 652 (1951).

3. "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" are allowed as deductions from gross income in computing net income. INT. REV. CODE § 23(a)(1)(A).

4. The occulists included the payments in their gross income.

5. 14 T.C. 1066 (1950).

6. 188 F.2d 269 (4th Cir. 1951).

7. See note 3 *supra.*

8. *E.g.,* Great Northern Ry. v. Commissioner, 40 F.2d 372 (8th Cir. 1930); William F. Davis, 17 T.C. 549 (1951). *But cf.* Jerry Rossman Corp. v. Commissioner, 175 F.2d 711 (2nd Cir. 1949) (innocent overcharges violating the Emergency Price Control Act held to be deductible because no sharply defined policies of Act frustrated); National Brass Works v. Commissioner, 182 F.2d 526 (9th Cir. 1950) (amount of overcharge paid in settlement of government claim for treble damages for an innocent overcharge violating price regulations of OPA held to be not a penalty and deductible).

9. T. G. Nicholson, 38 B.T.A. 190 (1938).

10. Compensation paid to employees in gambling establishments is deductible. G. A. Comeaux, 10 T.C. 201 (1948). "Protection money" paid to stay in the illegal business is not an ordinary and necessary expense. Cohen v. Commissioner, 176 F.2d 394 (10th Cir. 1949); Maddas v. Commissioner, 40 B.T.A. 572 (1939), *aff'd,* 114 F.2d 548 (3d Cir. 1940).

unethical nature were held to be non-deductible.[11] The rationale of these decisions seems to be that if a contract is unenforceable because it is against public policy, then payment pursuant to such a contract is not an ordinary and necessary business expense. However, in at least one case [12] the court looked only to policy as defined in statutory law in arriving at the result that payments were not opposed to public policy.[13] In 1943, the United States Supreme Court in *Commissioner v. Heininger*,[14] announced a "frustration test." In allowing a deduction for lawyers' fees in an unsuccessful attempt by the taxpayer to get an injunction against a mail fraud order issued by the Postmaster General, the Court held that deductions should be allowed where they would not "frustrate sharply defined national and state policies proscribing particular types of conduct." Apparently this decision drew the line beyond which the Tax Court was not to look toward public policy in disallowing deductions. But that the concept of "sharply defined policies" has been difficult to apply is manifest from the varying decisions since the *Heininger* case. On several occasions the courts used public policy to disallow a deduction although no state or federal statute would have been frustrated by allowing it.[15] Other decisions have interpreted "sharply defined policies" as meaning policies defined in statutory law.[16] In the instant case the Court first determined that the "kickbacks" were ordinary and necessary expenses within the generally accepted meaning of those words [17] by a consideration of economic factors inherent in the optical industry. Then they reasoned that, assuming that public policy considerations could narrow the field of allowable deductions under some circumstances, nevertheless these expenditures did not frustrate policies evidenced by state or federal legislative declarations, and therefore did not

11. Textile Mills Corp. v. Commissioner, 314 U.S. 467 (1941) (lobbying expenses); Raymond F. Flanagan, 47 B.T.A. 782 (1942) (expenses entertaining public officials in order to get government contracts); Charles H. McGlue, 45 B.T.A. 761 (1941) (payments to develop political influence); T.G. Nicholson, 38 B.T.A. 190 (1938) (payments to develop political influence); Kelley-Dempsey & Co., 31 B.T.A. 351 (1934) (excessive payments to secure materials for work and to insure prompt delivery thereof). The disallowance in this last case was based not only on the public policy ground but also because the payments were unreasonable. Where commissions were paid to salesmen who were primarily hired because they had influence with state agencies the deduction was disallowed. New Orleans Tractor Co., 35 B.T.A. 218 (1936); Easton Tractor & Equipment Co., 35 B.T.A. 189 (1936). *But cf.* Alexandria Gravel Co. v. Commissioner, 95 F.2d 615 (5th Cir. 1938), *reversing* 35 B.T.A. 323 (1937).

12. F. L. Bateman, 34 B.T.A. 351 (1935).

13. "While tipping may be deplored by some, it is a common practice; although such practice may create discrimination, it is not against public policy, *as reflected in statutory law*, and is known to produce results sometimes commendable when other methods fail." (Emphasis supplied) *Id.* at 367.

14. 320 U.S. 467 (1943).

15. See Kerrigan Iron Works, Inc., 17 T.C. 566, 578 (1951); Excelsior Baking Co. v. U.S., 82 F. Supp. 423 (D. Minn. 1949). Both of these cases involved payments to clear up labor difficulties.

16. See Polley v. Westover, 77 F. Supp. 973 (S.D. Cal. 1948) (trade discounts allowed); Marra Bros., Inc., P-H 1944 TC MEM. DEC. ¶ 44,404 (1944) ("tips" allowed).

17. See Deputy v. duPont, 308 U.S. 488 (1939); Welch v. Helvering, 290 U.S. 111 (1933); Commissioner v. Heininger, 320 U.S. 467 (1943).

fall within the class of expenses disallowed because they frustrated sharply defined policies proscribing particular types of conduct.

Recently there has been a tendency by the Tax Court to use the Internal Revenue Code to punish violators of laws and to regulate business practices.[18] The instant decision is notice to the taxing authorities that the Code is to be used to tax people on net income and not to enforce other policies by imposing a tax on gross income.[19] It is significant to note that a dictum in the instant case apparently restricts the "sharply defined policies" of the *Heininger* rule to explicit legislative policies as defined in statutory law.[20] As a practical matter expenses pursuant to agreements contrary to those statutory policies could be held to be neither ordinary nor necessary with the meaning of § 23(a)(1)(A) "by virtue of their illegality".[21] It would appear that in the future courts will have to give greater consideration to economic factors such as the duration and extent of the business practice, the amount of the payment in relation to the service rendered or the goods received, the consequences if the payments are not made, the type of business involved, and customs and actions of organizations which affect competitive standards in determining whether an expense is ordinary and necessary within the meaning of § 23(a)(1)(A). Where an expense is an economic necessity only the most explicit public policy will henceforth bar its deductibility.

LABOR RELATIONS—STRIKES AND BOYCOTTS—NATIONAL LABOR RELATIONS ACT—EMPLOYEE ACTIVITY TO FORCE RECOGNITION DURING PENDENCY OF REPRESENTATION PROCEEDINGS HELD NOT PROTECTED—The U.E.W. and an independent union each desired recognition as the exclusive bargaining agent for the production and maintenance workers at the employer's plant. On July 7, the Independent filed a representation petition with the National Labor Relations Board (the first step in union election and certification proceedings).[1] On July 13, the executive board of the U.E.W. local instituted a consumer's boycott[2] against the employer's goods in order to force the employer to grant the desired recognition. On July 21, following a preliminary hearing on the Independent's petition, a

18. See note, 51 COL. L. REV. 752 (1951).

19. "There is no statement in the Act, or in its accompanying regulations, prohibiting the deduction of ordinary and necessary business expenses on the ground that they violate or frustrate 'public policy'." Instant case at 499.

20. "The policies frustrated must be national or state policies evidenced by some governmental declaration of them." Instant case at 501.

21. Instant case at 500.

1. 29 CODE FED. REGS. § 101.16 (1949) (N.L.R.B. Statement of Procedure).

2. The court did not consider whether this boycott in any way violated the "secondary boycott" provisions of the LABOR MANAGEMENT RELATIONS ACT, 61 STAT. 140 (1947), 29 U.S.C. § 158(b)(4) (Supp. 1951) (Taft-Hartley Act).

consent election was set for August 17.[3] On August 2, the employer informed the members of the executive board of the U.E.W. local that they would be discharged unless they called off the boycott. The board members refused to do so, were laid off the same day, and were later discharged. Upon a charge brought by these union leaders, the National Labor Relations Board held that the lay-offs and discharges were an employer unfair labor practice[4] and ordered that these persons be reinstated with back pay.[5] The court of appeals denied enforcement. It is an unfair labor practice for an employer to grant a union recognition as exclusive bargaining agent while an election to determine that question is pending. The National Labor Relations Act affords no protection to concerted activity intended to force an employer to violate the Act. Thus the Board could not interfere with lay-offs and discharges on account of such activity. *Hoover Co. v. N.L.R.B.*, 191 F.2d 380 (6th Cir. 1951).

This decision represents an extension of the doctrine, announced in *American News Co.*,[6] that in some circumstances it is not an unfair labor practice for an employer to discharge union members for participating in a strike designed to force an employer to violate a federal law. Thus, a minority strike while the majority remains at work and continues to bargain with the employer has been held unprotected because the interference with collective bargaining by the majority union violates the purpose of the Act.[7] Before the Taft-Hartley Act expressly so provided,[8] it was held that a strike for exclusive recognition of one union, despite the Board's recent certification of another, was unprotected because it was an attempt to compel the employer to violate the Act.[9] In enacting the Taft-Hartley Act, Congress did not intend to interfere with this body of case law.[10]

In *Midwest Piping & Supply Co.* and other cases,[11] the Board established the rule that it is an unfair labor practice for an employer to recognize

3. The U.E.W. was not on the ballot due to the failure of its officers to sign non-Communist affidavits as required by the Act (61 STAT. 143 (1947), 29 U.S.C. § 129(h) (Supp. 1951)). However, it was represented at the preliminary hearing, and campaigned against the Independent before the election. The Independent won the election.

4. The provisions of the Act relied upon were: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 61 STAT. 140 (1947), 29 U.S.C. § 158 (Supp. 1951).

5. The Hoover Co., 90 N.L.R.B. 1614 (1950).

6. 55 N.L.R.B. 1302 (1944), followed by the court in N.L.R.B. v. Indiana Desk Co., 149 F.2d 987 (7th Cir. 1945). *But cf.* Hamilton v. N.L.R.B., 160 F.2d 465 (6th Cir. 1947), *cert. denied*, 332 U.S. 762 (1947).

7. N.L.R.B. v. Draper Corp., 145 F.2d 199 (4th Cir. 1944).

8. 61 STAT. 140 (1947), 29 U.S.C. § 158(b)(4)(C) (Supp. 1951).

9. Thompson Products, Inc., 72 N.L.R.B. 886 (1947), *vacating* 70 N.L.R.B. 13 (1946).

10. SEN. REP. No. 105, 80th Cong., 1st Sess. 28 (1947).

11. Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945), followed in International Harvester Co., 87 N.L.R.B. 1123 (1949); Basic Vegetable Products, Inc., 75 N.L.R.B. 815 (1948); American Patrol Service, 75 N.L.R.B. 662 (1947).

one union as the exclusive bargaining agent of his employees when election proceedings have passed the initial stage of filing a representation petition with the Board, and a real doubt exists as to which union is supported by a majority of the employees.[12] The reasons assigned for the rule are that the employer's action violates his duty of neutrality among the rival unions, and is an unwarranted interference with the Board's election procedures.[13] When a strike for exclusive recognition is conducted during the pendency of election proceedings, the votes of the strikers will be counted.[14] Nevertheless, if the strikers succeed in getting any substantial concessions from the employer, even short of recognition, the election of their union will be voided.[15]

A somewhat different situation is presented in the *Elastic Stop Nut* line of cases.[16] In these cases, the Board's regional office had not issued a notice of hearing,[17] there had been no consent election agreement and no election was pending, but rival unions had each claimed to represent a majority of the employees. The employer had granted exclusive recognition to one of the rivals. At the unfair labor practice hearing the Board found that a real doubt concerning representation existed, and held that the employer's recognition constituted an unfair labor practice. The Board's order in these cases did not impose any penalty upon the employer or

12. No unfair labor practice is committed when: (1) The employer has no reason to doubt the majority status of the union he contracts with. N.L.R.B. v. Standard Steel Spring Co., 180 F.2d 942 (6th Cir. 1950); Gulf Shipside Storage Corp., 91 N.L.R.B. 181, 210-213 (1950). (2) The contracting union's only rival has become defunct and there is no evidence that the contracting union did not have a majority. Ensher, Alexander & Barsoon, Inc., 74 N.L.R.B. 1443 (1947). (3) The representation petition is filed and the contract is made during a year in which the contracting union is certified. Lift Trucks, Inc., 75 N.L.R.B. 998 (1948).

A petition to enforce such an unfair labor practice order will be denied when, because of delay since the events in question, enforcement of the order would no longer be remedial, but disruptive to collective bargaining. N.L.R.B. v. C.W. Hume Co., 180 F.2d 445 (9th Cir. 1950); N.L.R.B. v. Flothill Products, Inc., 180 F.2d 441 (9th Cir. 1950); *cf.* Eaton Mfg. Co., 76 N.L.R.B. 261 (1948) (Board refused to make such an order on similar grounds)

13. *See* Midwest Piping & Supply Co., 63 N.L.R.B. 1060, 1070 (1945); Ensher, Alexander & Barsoon, Inc., 74 N.L.R.B. 1443, 1444 (1947).

14. Columbia Pictures Corp., 64 N.L.R.B. 490 (1945); National Silver Co., 71 N.L.R.B. 594 (1946). In *National Silver,* Chairman Herzog and Member Reynolds declined to hold whether the strikers were protected by the Act (concurring opinions, pp. 602-604). In Pipe Machinery Co., 76 N.L.R.B. 247 (1948), an election was ordered during the pendency of a strike by one of the rival unions, but all parties had requested an immediate election.

15. General Steel Products Corp., 77 N.L.R.B. 810 (1948). But not when the concessions are insignificant. Phelps Dodge Copper Products Corp., 63 N.L.R.B. 686 (1945).

16. Elastic Stop Nut Corp. v. N.L.R.B., 142 F.2d 371, 379 (8th Cir. 1944), *cert. denied,* 323 U.S. 722 (1944); Douglas Canning Co., 85 N.L.R.B. 1005 (1949); Stanislaus Food Products Co., 79 N.L.R.B. 260 (1948); Federal Mogul Corp. 76 N.L.R.B. 1 (1948); I. Spiewak & Sons, 71 N.L.R.B. 770 (1946).

17. Consent election agreements must be entered into by the employer and any individuals or labor organizations representing a substantial number of the employees involved. The approval of the regional director is necessary. 29 CODE FED. REGS. § 102.54 (1949) (N.L.R.B. Rules & Regs., Series 5). If no such agreement is made, the regional director serves a notice of hearing upon the parties and any known individuals or labor organizations purporting to act as representatives of any employees directly affected. *Id.* § 102.55.

union beyond restoring the *status quo ante* by requiring the employer to cease and desist from recognizing the union. If the rule of the instant case were extended to the *Elastic Stop Nut* situation, however, the result would be a penalty upon the recognition strikers and not simply a restoration of the *status quo ante*. It is doubtful that such a penalty is proper in the absence of a consent election agreement or a notice of hearing to warn the strikers that the Board will not consider their union as entitled to exclusive recognition because of a real doubt concerning its majority status. Moreover, such strikers should be protected in the exercise of their economic power until there is some assurance of Board action to resolve the representation question.[18] Thus, in *I. Spiewak & Sons*,[19] the Board held that such strikers were protected against the employer's subsequent unfair labor practices in connection with the strike.[20] For similar reasons, it would seem that the mere filing of a representation petition without a consent election agreement or notice of hearing should not have the effect of withdrawing the protection of the Act from recognition strikers. A contrary rule would permit employers or rival unions to harass the striking union by simply filing a representation petition.[21]

Thus limited, the holding of the instant case appears to be a proper extension of the *American News* doctrine. Before reaching the conclusion that any type of concerted activity is "illegal" under the Act, with the consequence of non-protection, it would seem that the real inquiry should be into the likelihood that this type of activity will force employers to violate the Act, and the existence of practical justification for such an activity. In the instant case there could be no doubt that the union conduct, if successful, would have forced an employer violation. Moreover, the employees in the instant case were hardly justified in resorting to the use of economic power [22] after they had been informed and assured that the machinery provided by the Act would be used to resolve the dispute. The conjunction of

18. Inadequacy of funds and staff occasionally has prevented the Board from acting upon representation petitions with reasonable promptness. MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 254 (1950). The Board's operations have thus not succeeded in eliminating recognition strikes, and they remain numerous. *Id.* at 91-93.

19. 71 N.L.R.B. 770 (1946).

20. In Brashear Freight Lines, 119 F.2d 379 (8th Cir. 1941), the court held that minority recognition strikers were only economic strikers, because the employer was under no duty to bargain with a minority. There was no majority union. Accordingly, enforcement was denied to an order for compulsory reinstatement of such strikers by displacing the replacements. The order is contained in Brashear Freight Lines, Inc., 13 N.L.R.B. 191, 203 (1939). However, the *Brashear* case has been erroneously considered as holding that such strikes are illegal and hence unprotected. *See* N.L.R.B. v. Draper Corp., 145 F.2d 199, 204 (4th Cir. 1944) (clearly distinguishable in that there a minority strike disrupting collective bargaining by the majority union was involved); Hamilton v. N.L.R.B., 160 F.2d 465, 469 (6th Cir. 1947) (purely dictum). For a correct view of the *Brashear* case, see N.L.R.B. v. Ohio Calcium Co., 133 F.2d 721, 728 (6th Cir. 1943); *see* Western Cartridge Co. v. N.L.R.B., 139 F.2d 855, 858 (7th Cir. 1944).

21. An employer has the same right to file a representation petition as his employees. 61 STAT. 143 (1947), 29 U.S.C. § 159(c) (Supp. 1951).

22. Undoubtedly the boycott in the instant case affected the employer adversely, and, indirectly, it therefore may have harmed the public. Had it been a strike, it would have had a direct and adverse effect upon the public, the employer, and the employees.

these two factors should result in a withdrawal of the protection of the Act.

In situations where a real question concerning representation exists, the instant case presents employers and rival unions with an opportunity to protect themselves against the effects of a recognition strike or boycott by securing Board acceptance of their election petitions, because withdrawal of the protection of the Act at that point will have a considerable deterrent effect upon their opponent's tactics. Once the election establishes a majority union, such activities will remain unprotected during the period of certification.[23] This is of peculiar applicability to unions which, like the U.E.W. in the instant case, cannot secure Board certification because they refuse to comply with the filing requirements of the Act.[24] Such unions can force recognition only by a strike or boycott. The instant case will naturally be important in industries where real questions concerning representation often arise; for example, industries with a heavy turnover of employees, or those hitherto unorganized where independent unions challenge the organizational activities of national unions, as in the South. In such cases the tendency of this decision will be to induce the unions involved to forego the recognition strike and boycott in favor of the peaceful procedures afforded by the Act.

LABOR RELATIONS—TAFT-HARTLEY ACT—DISCRETIONARY AUTHORITY OF THE NLRB TO DISMISS COMPLAINTS IN THE BUILDING AND CONSTRUCTION INDUSTRY—Glaziers' Union, by means of secondary boycotts in violation of the Taft-Hartley Act,[1] attempted to eliminate the use of preglazed material in the building and construction industry in Joliet, Ill. The NLRB refused to assert jurisdiction against the union on the ground that its activities had an insubstantial impact on interstate commerce.[2] On appeal the court of appeals held that the Board thereby had abused its discretion. *Joliet Contracting Ass'n. v. N.L.R.B.*, 193 F.2d 833 (7th Cir. 1952).

The NLRB is empowered to take jurisdiction in any case of an unfair labor practice "affecting commerce." [3] As the Labor Relations Act existed prior to 1947, the Board had wide discretionary authority in respect to its assertion of jurisdiction.[4] Although the NLRB was empowered to act

23. See note 8, *supra.*

24. See note 3, *supra.*

1. 61 STAT. 140 (1947), 29 U.S.C. § 158(b)(4)(A) (Supp. 1950). For a definition of a secondary boycott, see Wadsworth Building Co., 81 N.L.R.B. 802, 805 (1949).

2. Glaziers' Union Local No. 27, 90 N.L.R.B. 542 (1950).

3. 61 STAT. 1 (1947), 29 U.S.C. § 160(a) (Supp. 1950). This language was carried over unchanged from the Wagner Act under which it was construed to mean "all conduct having such consequences that constitutionally [Congress] can regulate." Polish National Alliance v. N.L.R.B., 322 U.S. 643, 647 (1944).

4 *See* N.L.R.B. v. Indiana & Michigan Electric Co., 318 U.S. 9, 18-19 (1943); N.L.R.B. v. Federal Engineering Co., Inc., 153 F.2d 233, 234 (6th Cir. 1946).

against any alleged unfair labor practice which had more than a de minimis effect upon commerce, it could decline to issue an unfair labor practice complaint for "policy" reasons.[5] The theory of the decision in the instant case is that the Board's discretion to refuse to act in disputes affecting commerce was greatly curbed by the 1947 Act.[6] To meet the criticism that an agency should not combine within itself the roles of prosecutor and judge, the Taft-Hartley Act creates the separate office of General Counsel vested with "final authority, on behalf of the Board," to investigate charges, issue complaints and prosecute such complaints before the Board.[7] The General Counsel has contended unsuccessfully that this change precludes the Board from declining to assert jurisdiction on policy grounds after a complaint has been issued.[8] The Board's position that it still has discretionary power to refuse to act on policy grounds, despite the independent office of prosecutor, has been given judicial sanction.[9] Moreover, to permit the NLRB to invoke limitations on jurisdictions is not inconsistent with the purpose of separation of functions, which is to prevent the possibility of bias when disputes are adjudicated by the same authority which supervised their prosecution.[10]

However, the legislative history of the Taft-Hartley Act indicates that Congress intended the Board to exercise full constitutional power to prevent secondary boycotts in the building and construction industry.[11] In view of this, the NLRB at first accepted any case which it felt met the statutory requirement of having more than a de minimis impact upon commerce.[12]

5. In a recent Board decision "policy" as it existed under the Wagner Act was justified as follows: "There was nothing unique in the existence of this permissive power in the Board. Indeed, the presence of this discretion in the administrative agency charged with responsibility for effectuating the policy of a public statute is the hallmark of the administrative process. It is this very characteristic which distinguishes an administrative agency from a court of law." Haleston Drug Stores, 86 N.L.R.B. 1166, 1168 (1949). See also Pillsbury, *Administrative Tribunals,* 36 HARV. L. REV. 405, 423 (1922).

6. See especially instant case at 841.

7. 61 STAT. 139 (1947), 29 U.S.C. § 153(d) (Supp. 1950). For a discussion of this provision see DAVIS, ADMINISTRATIVE LAW 406 (1951).

8. A-1 Photo Service, 83 N.L.R.B. 564, 566 (1949). The Board's position in this matter is that after the General Counsel issues a complaint and prosecutes before an examiner his "final authority" is exhausted. Any action the Board may thereafter take, either as a matter of policy or on the merits, is an exercise of its judicial powers under the Act and not a review of the General Counsel's action.

9. Haleston Drug Stores, Inc. v. N.L.R.B., 187 F.2d 418 (9th Cir. 1951), *cert. denied,* 72 S. Ct. 29 (1951). *See* N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675, 684 (1951).

10. 63 HARV. L. REV. 522, 524 (1950). For an appraisal of the testimony indicating the presence of bias in Board proceedings under the Wagner Act, see Davis, *Separation of Functions in Administrative Agencies,* 61 HARV. L. REV. 390, 409 (1948).

11. H.R. REP. No. 245, 80th Cong., 1st Sess. 24 (1947); SEN. REP. No. 105, 80th Cong., 1st Sess. 22, 54 (1947); 93 CONG. REC. 4198 (1947). *See* Shore v. Building & Construction Trades Council, 173 F.2d 673, 681 (3d Cir. 1949); Walter J. Mentzer, 82 N.L.R.B. 389, 392 (1949); Watson Co., 80 N.L.R.B. 533, 535 (1948). For the legislative history of the Act, see N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (1948). For a discussion of the parallel legislative intent to prohibit strikes resulting from jurisdictional disputes in the building industry, see Comment, 60 YALE L.J. 673, 681 (1951).

12. *E.g.,* Samuel Langer, 82 N.L.R.B. 1028 (1949); Wadsworth Building Co. 81 N.L.R.B. 802 (1949).

However, because of case load, the Board adopted in a series of 1950 decisions specific standards of effect upon commerce which must be shown before the Board will assert jurisdiction.[13] It is clear that this policy is based upon a discretionary power which the NLRB claims to possess and not upon a lack of power to act. The Board does not feel bound by these criteria for it also reserves the right to refuse to assert jurisdiction on undefined policy grounds.[14] These criteria were ignored by the Board in the instant case.

In setting aside the dismissal of the complaint, the court in effect held that where several related disputes have a substantial impact upon commerce, the NLRB has little or no discretion to decline jurisdiction. In determining the question of the effect upon commerce, the Board considered the case as a series of separate disputes. In repudiating that standard, the court said the totality of the situation must be the test rather than the activities of each individual employer.[15] This total effect theory is based upon cases in which federal courts affirmed action by the NLRB on its conclusion that the total effect of a number of unfair labor practices warranted its assertion of jurisdiction.[16] However, prior to the instant case, courts have also affirmed the Board's decision to refuse jurisdiction on the ground that the alleged violations represent a series of relatively insignificant disputes.[17] The instant decision severely restricts or eliminates the Board's utilization of its specialized knowledge in assessing the factual situation.[18] On this score the court's scope of review may be questioned.

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13. *E.g.*, the Rutledge Paper Products, Inc., 91 N.L.R.B. 625 (1950); The Borden Co., 91 N.L.R.B. 628 (1950); W.B.S.R., Inc., 91 N.L.R.B. 630 (1950). These standards are summarized in N.L.R.B. Release No. 357 as follows: "4. Enterprises which produce or handle goods destined for out-of-state, if the goods or services are valued at $25,000. a year. 5. . . . [or] furnish services or materials necessary to the operation of [an instrumentality of interstate commerce] provided such goods or services are valued at $50,000. a year. 6. Any other enterprise which has: (a) a direct inflow of material valued at $500,000. a year; or (b) an indirect inflow of material valued at $1,000,000. a year." For a discussion of these standards, see 2 CCH LAB. LAW J. 247, 249 (1951). These tests were applied to the secondary boycott situation in Jamestown Builders Exchange, 93 N.L.R.B. 386 (1951).

14. Local Union No. 12 v. N.L.R.B., 189 F.2d 1 (7th Cir. 1951); Haleston Drug Stores v. N.L.R.B., 187 F.2d 418 (9th Cir. 1951); A-1 Photo Service, 83 N.L.R.B. 564 (1949).

15. The court concluded that the union sought to eliminate wholly the use of preglazed materials in the building industry in the Joilet area. This same union had already achieved this result in Chicago. Instant case at 839. The fact that the union had engaged in the alleged secondary boycott was admitted for purposes of this appeal.

16. Cases cited, instant case at 841-43.

17. Haleston Drug Store v N.L.R.B., 187 F.2d 417 (9th Cir. 1951); *accord*, Herzog v. Parsons, 101 F.2d 781 (D.C. Cir. 1950). Considerations as to whether particular fact situations represent separate disputes or one concerted effort to bring about changes in an area are discussed in the recent case of Jamestown Builders Exchange, 93 N.L.R.B. 386 (1951).

18. In the instant case the principal facts are not in dispute The Board presumably interpreted these facts as not indicating a comprehensive plan on the part of the union to eliminate preglazed material in the area. This may be a factual issue which the specialized NLRB is more competent to decide than the court. See by analogy Judge Hand in N.L.R.B. v. Standard Oil Co., 138 F.2d 885 (2d Cir. 1943). The weight to be given expertese was somewhat limited in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 479 (1951).

Yet the opinion painstakingly reviewed the record and found that the Board's decision was not supported by substantial evidence. The result seems sound in view of the extended scope of review which courts of appeals have under the Taft-Hartley Act [19] and the showing of widespread results of the union's boycotts.

The court's restriction of the Board's discretion in this area finds support in the fact that Congress, at the time of the passage of the Act, thought that virtually all secondary boycotts in the building industry substantially affected commerce.[20] The result in this case increases the significance of the General Counsel's initial decision to commence proceedings for an alleged unfair labor practice. This would seem to accentuate the conflict between the General Counsel and the Board which has greatly impeded the Board's operation.[21] Although this decision limits the discretionary power of the NLRB to dismiss complaints with respect to secondary boycotts in the building industry, the effects of the present case are limited by the fact that the Board, as the law now stands, retains the discretion to determine whether to seek enforcement of its decisions in the courts.[22]

19. The scope of review was extended by the Administrative Procedure and Taft-Hartley Acts beyond the requirements of the Wagner Act. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951); N.L.R.B. v. Pittsburgh S.S. Co., 340 U.S. 998 (1951).

20. The significance of local secondary boycotts as recognized by Congress is discussed in Shore v. Building & Construction Trades Council, 173 F.2d 678, 681 (3d Cir. 1949).

21. Because of the confusion and friction caused by the bifurcation of NLRB functions, a bill was introduced in Congress to abolish the office of General Counsel. This plan was rejected. For a thorough treatment of this internal conflict, see Comment, 48 MICH. L. REV. 1149 (1950).

22. Section 10(e) of the Wagner Act carried over unchanged in the new Act provides: "The Board shall have power to petition any circuit court of appeals . . . for the enforcement of such order." 61 STAT. 147 (1947), 29 U.S.C. § 160(e) (Supp. 1950). This was construed to prevent any private party from seeking enforcement of an NLRB order. N.L.R.B. v. Sunshine Mining Co., 125 F.2d 757 (7th Cir. 1942). Only the Board may institute proceedings for violation of a court decree enforcing its order. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940).